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IN THE

Supreme Court of the United States

October Term, 1967
No. 1305

VILIS MARTINS LAPENIEKS,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinion Below.	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	3
1. Jurisdiction of the Courts Below.	3
2. The Petition of Vilis Martins Lapenieks for Naturalization	3
Reasons for Granting the Writ	5
Conclusion	7
Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit:	
Majority Opinion	1
Dissenting Opinion	8

TABLE OF AUTHORITIES CITED

Case	Page
Cannon v. United States, 288 F. 2d 269	6
Kadich, Joseph, Petition for Naturalization of, 221 F. Supp. 353	6
McGrath v. Kristensen, 340 U.S. 162	5
Mirzoelff, Israel, Petition for Naturalization of, 196 Fed. Supp. 230	6
Rego's Petition, In re, 289 F. 2d 174	6
United States v. Hoellger, 273 F. 2d 760	6
United States v. Lacher, 299 F. 2d 919	6
Statutes	
Act of June 27, 1952, 66 Stat. 242	2
Immigration and Nationality Act, Sec. 315	3
Immigration and Nationality Act, Sec. 316(a)	3
United States Code, Title 8, Sec. 1426	5
United States Code, Title 8, Sec. 1426(a)	2
United States Code, Title 8, Sec. 1427	3
United States Code Annotated, Title 28, Sec. 1254(1)	2
United States Code Annotated, Title 28, Sec. 1291	3
United States Code Annotated, Title 28 Sec. 1294	3

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Vilis Martins Lapenieks, Appellant below, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming an Order of the District Court for the Southern District of California. The District Court's Order was one denying Petitioner's Petition for Naturalization; the Court of Appeals, Judge Duniway dissenting, affirmed.

Opinion Below.

The opinion of the Court of Appeals is reported at 382 F. 2d 723; it is found at pages 50 through 57 of the Record, and is printed as Appendix "A" to this Petition.

Jurisdiction.

1. The judgment sought to be reviewed was entered on January 11; 1968 [R. 49].

2. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C.A., sec. 1254(1).

3. The grounds upon which that jurisdiction is invoked are that the Court of Appeals in affirming the denial of Petitioner's Petition for Naturalization has decided an important question of federal law relating to eligibility for citizenship, which has not been, but should be considered and settled by this Court.

Question Presented.

Where a resident alien is at first exempted from military service on the ground of his alienage, and such exemption on the ground of alienage is subsequently withdrawn by the Government as a result of a change in Selective Service regulations, and thereafter the alien is called for military service but rejected because of physical disability, has the alien been effectively relieved from military service on the statutory ground of his alienage or because of his disability; and, if because of said disability, is not said alien eligible for naturalization?

Statutes Involved.

The statute involved is section 1426(a) of Title 8 of the United States Code (Act of June 27, 1952, 66 Stat. 242), providing:

> "Notwithstanding the provisions of section 405-(b) of this Act, any alien who applies or has applied for exemption or discharge from training or

service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Statement of the Case.

1. Jurisdiction of the Courts Below.

This is an appeal from an order entered on December 6, 1965, by the United States District Court, Southern District of California, Central Division, denying the appellant's Petition for Naturalization [R. 23-37], which was brought under the provisions of Section 316(a) of the Immigration and Nationality Act (8 U.S.C. 1427). The District Court's jurisdiction was invoked under the provisions of said Act and the Court of Appeals had jurisdiction in the case under 28 U.S.C.A. Sections 1291 and 1294.

2. The Petition of Vilis Martins Lapenieks for Naturalization.

Petitioner Vilis Martins Lapenieks was born in Riga, Latvia on November 10, 1931. On or about January 21, 1952, he entered the United States for permanent residence. Approximately 30 days after his arrival in the United States, Petitioner moved to Miami, Florida, and there registered for Selective Service at Local Board No. 47 in Miami. On October 23, 1952, Petitioner was classified 1-A by the Selective Service system. As a result of Petitioner's request for exemption due to the fact that he was a treaty alien and eligible for exemption, Petitioner was reclassified 4-C on November 20, 1952. At or about June 8, 1953, Petitioner

received a letter from the Selective Service system advising him in effect that if he continued to claim his exemption on the ground of alienage he would be ineligible to become a citizen of the United States. Petitioner advised his local draft board that he did desire to be ineligible for military service on that ground. On or about April 11, 1957, Local Board No. 47 in Miami, Florida advised Petitioner that Local Board Memorandum No. 39 was rescinded on March 1, 1956, and further advised Petitioner that he was no longer eligible to be deferred in class 4-C. At the same time, Petitioner was notified that he had once again been classified 1-A. On or about August 20, 1957, Petitioner took a pre-induction physical examination for the United States Army. Subsequent thereto, on or about October 10, 1957, Petitioner was advised by Local Board No. 47 in Miami, Florida, that he had been classified in class 4-F. At or about August 20, 1957, when Petitioner reported for his armed forces pre-induction examination, he was ready and willing to serve in the armed forces of the United States. On September 6, 1963, Petitioner filed his Petition for Naturalization. Prior to that time, on or about June 10, 1963, Petitioner made a sworn statement. On the date of the filing of the formal petition herein, Petitioner was given an examination under oath with regard to his prior history, including the proceedings regarding his request for exemption from the military service. Thereafter, on or about May 21, 1965, the naturalization examiner made his findings of fact, con-

clusions of law and recommendations in which he recommended denial of Petitioner's Petition. The basis for the examiner's decision was that the Petitioner on June 16, 1953, was a resident alien, liable for training and service in the armed forces of the United States; that the Petitioner applied for exemption from training and service in the armed forces of the United States because of alienage and was relieved from such training and service on said ground; and that the Petitioner had failed to establish that he was not ineligible for naturalization by virtue of the provisions of Section 315 of the Immigration and Naturalization Act (8 U.S.C. 1426) [R. 8-11].

Reasons for Granting the Writ.

The case presents an important question concerning the nature of eligibility for citizenship that has not been settled by this Court. The opportunity to become a citizen is one of the most fundamental opportunities available to persons seeking and obtaining status as permanent residents of the United States. Limitations on that opportunity should be clearly and unambiguously spelled out. This Court has indicated in *McGrath v. Kristensen,* 340 U.S. 162 (1956) that effective relief from military service is a necessary precondition for ineligibility for citizenship under the statute here in question. It has not, however, indicated whether the kind of exemption afforded to this Petitioner, to-wit: the granting of an exemption followed by the withdrawal of it, constitutes such relief. If, indeed, tem-

porary relief from military service is all that is required to constitute a bar to citizenship, then it is difficult to rationalize those decisions such as *United States v. Hoellger,* 273 F. 2d 760 (2d Cir. 1960); *Cannon v. U.S.,* 288 F. 2d 269 (2d Cir. 1961); *In re Rego's Petition,* 289 F. 2d 174 (3d Cir. 1961); and *United States v. Lacher,* 299 F. 2d 919 (9th Cir. 1962), in which citizenship was granted subsequent to an exemption based on alienage. If, on the other hand, permanent exemption from military service is required to constitute a bar, that permanent exemption ceased when the Selective Service system reclassified this Petitioner.

Although it cannot fairly be said that clear conflict exists between the different circuit courts of appeal, a very wide variety of approaches is to be discerned in the numerous district and appellate court cases involving this question.

Thus, in both *Petition for Naturalization of Israel Mirzoelff,* 196 Fed. Supp. 230 (SDNY 1961), and *Petition for Naturalization of Joseph Kadich,* 221 F. Supp. 353 (SDNY 1963), aliens were granted citizenship in circumstances very similar to those of this Petitioner, after having been rejected by the Army for reasons of disability; and even in *United States v. Hoellger,* 273 F. 2d 760 (2d Cir. 1960), one of the leading cases in this field, Judge Moore in his concurrence would have granted citizenship irrespective of whether, subsequent to reclassification, the alien actually entered the military service.

On a question as fundamental as eligibility for citizenship, it is manifest that the exercise of this Court's certiorari jurisdiction is fully justified to the end that a uniform and orderly rule of eligibility develop.

Conclusion.

A Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be issued, so that the Court's judgment affirming the judgment of the District Court on the question of Petitioner's eligibility for citizenship may be reviewed.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Vilis Martins Lapenieks, Appellant, vs. Immigration and Naturalization Service, Department of Justice, etc., Appellee. No. 21,199.

[January 11, 1968]

Appeal from the United States District Court, Southern District of California, Central Division.

Before: Chambers and Duniway, Circuit Judges, and Beeks, District Judge.

BEEKS, District Judge.

This appeal is from an order of the District Court denying a petition for naturalization filed pursuant to 8 U.S.C. §1427. The trial court denied the petition on the ground that in 1952 the appellant had availed himself of an exemption from military service, as a Latvian national residing in the United States, where one of the conditions of claiming said exemption was permanent ineligibility for citizenship. In 1956, a change in Selective Service regulations eliminated the exemption, and appellant was reclassified I-A. He never served in the military, however, because he did not pass the physical examination administered in 1957. The question thus presented is whether the permanent bar to citizenship which appellant voluntarily accepted by claiming the exemption in 1952 was lifted when the exemption was terminated in 1957. The trial court held that the bar was not lifted, and we affirm.

Appellant immigrated into the United States from Latvia in 1952, at the height of the Korean conflict. At that time, appellant was entitled, upon application, under the Selective Service Regulations then in effect (16 Fed. Reg. 9852) (revoked Feb. 17, 1956) and under a treaty with Latvia, to military exemption through a IV-C classification. But any alien who made application for such an exemption was thereafter, "debarred from becoming a citizen of the United States. . .", as provided in Section 4(a) of the Selective Service Act of 1948, 50 U.S.C. App. Sec. 454(a).

After appellant registered for the draft in August of 1952, he was initially classified I-A, and apparently was ordered to report for a pre-induction physical examination on November 17, 1952.[1] The trial court found great significance, as do we, in the fact that this nation was then engaged in a brutal struggle in Korea, where American armed forces were sustaining heavy casualties.[2] In November of 1952 appellant wrote his draft board, reciting that he was a "citizen of the Latvian Republic", and requesting that, ". . . I, as a citizen of Latvia should not be drafted for a time, but classified under IV-C group. . . I ask you kindly to consider the above mentioned and if possible revise your decision and *delay my being drafted at this time.*"

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[1]The order to report for a physical examination does not appear of record; but we conclude that there was such an order from petitioner's exhibit C, the letter from his draft board cancelling the order.

[2]"Of the manifold problems confronting me early in 1953 none required more urgent attention than the war in Korea. By election time in 1952 American casualties had reached a total of 21,000 killed, 91,000 wounded, and 13,000 missing, making this the fourth most mostly conflict in United States history, ranking only behind the Civil War and the two world wars." Eisenhower, Dwight D., *Mandate for Change,* (Garden City, N.Y., 1963), p. 171.

(petitioner's exhibit B) (emphasis added). His draft board responded promptly, reclassifying him IV-C and cancelling his order that he report for a pre-induction physical examination. Appellant testified in the district court that during his correspondence with the draft board and with the Immigration Service in October and November of 1952, he was advised that if he exercised his rights under the treaty to claim a IV-C classification that he would forever lose his rights to United States citizenship.

Effective December 24, 1952, Congress overhauled the immigration and naturalization laws with the passage of the Immigration and Nationality Act of 1952 (8 U.S.C. §1101 et seq.) The provision thereof relevant to this case is Sec. 315(a) of that Act (8 U.S.C. §1426(a)):

> Notwithstanding the provisions of Section 405(a) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

In June of 1953, appellant's board sent him a letter quoting the relevant language from Section 315, and informing him, "We are advising you of the above provisions of the law in order that you may place in your file conclusive evidence as to whether or not you personally desire exemption from military service in the armed forces of the United States *since such exemption will permanently bar you from becoming a*

citizen of the United States." (emphasis added.) Appellant signed at the bottom of the letter in the space provided beneath the following words: "Having full knowledge of the above facts, I wish to be exempt from military service in the armed forces of the United States," and returned the letter to his draft board.[3]

The Korean truce was signed on July 27, 1953.[4]

The President of the United States, by Executive Order in February of 1956, withdrew the right of permanent resident aliens to claim exemption under international treaties. Exec. Order No. 10659, 21 Fed. Reg. 1079, 1082 (1956). In short order, appellant's local board re-classified him I-A. But appellant was found unfit at his pre-induction physical in 1957. He was classified IV-F, and has never served in the armed forces of this country. This petition for naturalization was filed in 1963.

Appellant and the Government agree that the provisions of the Immigration and Nationality Act of 1952, and more specifically Section 315(a) thereof (8 U.S.C. Sec. 1426(a)) which is quoted above, govern this case, and not the provisions of Sec. 4(a) of the Selective Service Act of 1948 (50 U.S.C. App. §454(a).)[5]

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[3]Although the reason for sending this letter does not appear of record, the court in *In re Naturalization of Healy*, 183 F. Supp. 651, 652 (N.D. Cal. 1960) recites that beginning April of 1953 the National Headquarters of the Selective Service System instructed Local Boards that every alien who wished to be classified IV-C under a treaty should be required to acknowledge in writing that he requests such a classification with full knowledge of the provisions of Section 315 of the Immigration and Nationality Act of 1952.

[4]15 Cong. Rec. 10232 (1953).

[5]This conclusion is not at all certain; see the detailed consideration of this problem of statutory construction in *U.S. v. Hoellger*, 273 F. 2d 760, 763, n.3 (2d Cir. 1960). The trial

As appellant correctly points out, the Supreme Court in Ceballos v. Shaughnessy, 352 US 599, 1 L. ed 2d 583, 77 S. Ct. 545, held that "Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship: the alien must be one 'who applies or has applied for exemption,' and also one who 'is or was relieved or discharged from such training or service on such ground.'" 352 U.S. at 606. There can be no question in this case that appellant applied for exemption from military service on the ground he was an alien, and that such an exemption removed him from consideration for the draft for almost four years. The only question presented on these facts is whether appellant was effectively "relieved" from military service, within the meaning of Section 315(a), where the exemption was revoked in 1956.

The statute here in question has been construed by the Courts of Appeal of several circuits, as well as by several District Courts in cases presenting slightly differing factual situations. The case which is perhaps closest to this one on its facts is *In re Naturalization of Cuozzo,* 235 F. 2d 184 (3rd Cir. 1956). Cuozzo, a citizen of Italy, applied for and was granted in 1950 a IV-C classification, acknowledging in his application that, ". . . I understand I will forever lose my right to become a citizen of the United States. . . ." 235 F. 2d at 185. When the exemption for resident aliens was subsequently withdrawn, Cuozzo was reclassified I-A. Cuozzo never served, however, because he was found not

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court reached a contrary conclusion, but was of the view that the result here would be the same under either statute. Inasmuch as we concur with the latter conclusion, we accept *arguendo* the stipulation between the appellant and the Government that Section 315 should govern.

acceptable at his physical examination and classified IV-F. The Third Circuit held that he was not entitled to citizenship under the clear language of Section 315-(a).

The Courts have favored a different rule, however, where following the re-classification the alien is inducted into the armed services. See *U.S. v. Hoellger,* 273 F. 2d 760 (2d Cir. 1960); *Cannon v. U.S.,* 288 F. 2d 269 (2d Cir. 1961); *In re Rego's Petition,* 289 F. 2d 174 (3d Cir. 1961); and *U.S. v. Lacher,* 299 F. 2d 919 (9th Cir. 1962). It is these cases upon which appellant primarily relies.

It should be noted at the outset, however, that the rule announced by the courts in those cases is by no means unanimous. The Court in *Cuozzo, supra,* offered the following dictum:

> If, as has been suggested, administrative practice has been to refrain from insisting upon denial of citizenship to those aliens who do in fact serve their turn in the armed forces, that administrative practice cannot alter the explicit direction of the statute. (235 F. 2d at 185.)

A district court in this circuit denied citizenship to an alien who had claimed the exemption, despite the fact that he had subsequently served in the military, in *In re Cerati,* 160 F. Supp. 531 (N.D. Cal. 1957). And Judge Friendly, dissenting in *Cannon, supra,* suggests that even temporary relief from military service is sufficient to establish a permanent bar to citizenship under Section 315(a), (288 F. 2d at 272).

It is appellant's position that the exception carved into Section 315(a) by *Hoellger* and the cases following it

for aliens who claim the exemption but later serve in the armed forces should not be denied one who is rejected from service because of physical unfitness. No case has been brought to our attention which so holds; nor is there any language in the statute to support such an extension of the exception. *Cuozzo* constitutes direct authority for the Government's position here; and even the majority opinion in *Hoellger* itself, the birthplace of the exception, suggests that citizenship should be denied where the alien is found physically unfit after the subsequent re-classification. 273 F. 2d at 762, n.2. By availing himself of the alien's exemption from the draft during the years 1952 through 1956, appellant avoided service of this country during the Korean conflict, and avoided the risks of personal sacrifice which were taken by citizens of this country of the same age. Under these circumstances, we must conclude that appellant was effectively "relieved" from military service, within the meaning of Sec. 315 (a)

Appellant argues that the alien's exemption cannot be said to have relieved him from service, because he might have been found unfit at a physical examination in 1952, as he was in 1957. By the same token, the physical condition which provided appellant permanent relief from the draft may have arisen during the five years between 1952 and 1957. Had such been the case, it would be clear that the alien's exemption afforded appellant permanent relief from military service. It is possible that appellant's speculation and surmise as to what might have happened in 1952 if he had complied with the order to report for a physical examination is accurate. But no one will ever know, because appellant declined to take the necessary gamble. He preferred to

avail himself of the sure route to relief from military service: the alien's exemption. Having done so, appellant must live with the legal consequences of his decision.

AFFIRMED.

DUNIWAY, Circuit Judge:

I dissent.

In my opinion, petitioner was not effectively "relieved . . . from such [military] training or service on such ground," *i.e.*, "on the ground that he is an alien." (Section 315(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1426(a)). I think that the rationale of our decision in *United States v. Lacher*, 1962, 299 F.2d 919, leads to this result. In that case, we expressly relied on the decisions in *In re Rego's Petition*, 3 Cir., 1961, 289 F.2d 174, *Cannon v. United States*, 2 Cir., 1961, 288 F.2d 269, and *United States v. Hoellger*, 2 Cir., 1960, 273 F.2d 760.

In *Hoellger*, the alien applied for and obtained a IV-C classification (alien exemption). He was first so classified on the board's initiative, on September 11, 1952. He applied for a continuance of that classification in May, 1953. He continued to be classified IV-C until February 9, 1955, when he was reclassified I-A. He was inducted on April 6, 1957. In *Rego*, the alien applied for IV-C classification on June 29, 1951 and was so classified on October 16, 1951. Like Hoellger, he later asked to be continued in that classification, and this was done. He was reclassfied I-A on April 24, 1956, and was inducted on June 5, 1956. In *Lacher*, the alien was classified IV-C on March 3, 1954. He was classified 1-A on October 5, 1954 and was inducted

on May 28, 1956. *Cannon* is a little different. There, the alien was classified IV-C on September 11, 1952. On May 21, 1953, he applied for a continuance of this classification. He remained IV-C until November 8, 1954, when he asked that his application for exemption be withdrawn. He was reclassified to I-A on the next day and was drafted November 10, 1956 and inducted November 30, 1956. As is noted in the majority opinion in the present case, the Korean conflict ended on July 27, 1953. Thus, as in this case, Hoellger, Rego and Cannon each obtained exemption as an alien during that conflict and the reclassification and induction of each occurred long after the end of that conflict. Yet in each case the alien was held eligible for citizenship.

The statute itself makes no distinction between an alien who is relieved from military service on the ground that he is an alien during a time when this country is at war or engaged in a quasi-war or "police action," and one who is so relieved while this country is at peace. Thus, both the statute and the cases cited above show that the existence of the Korean conflict is legally immaterial. I respectfully suggest that my breathren have allowed a perfectly natural emotional reaction to Lapeniek's performance to affect their legal judgment.[1]

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[1]I suggest, too, that the decision of this court in *Lacher* requires that we follow the rationale of *Hoellger, Rego* and *Cannon,* on which we expressly relied. Thus, the fact that the court in *In re Naturalization of Cuozzo,* 3 Cir., 1956, 235 F.2d 184, may have had doubts about that rationale, the fact that Judge Goodman reached a result contrary to our *Lacher* holding in *In re Cerati.* N.D. Cal., 1957, 160 F. Supp. 531, and the fact that Judge Friendly dissented in *Cannon* are immaterial. We are bound by *Lacher.*

There then remains but one question: does the fact that Lapenieks, after being classified I-A and summoned to service, was not inducted because he was found physically unfit, while Lacher, Hoellger, Rego and Cannon were found fit and served, make a legal difference? I conclude that it does not. In all five cases, when the alien's exemption was terminated, he ceased to be relieved from training or service in the Armed Forces "on such ground," that is, "on the ground that he is an alien." (Section 315(a), *supra.*) The relief then ceased to be "effective" iin Lapeniek's case, just as it did in the other four cases. The decision not to induct him, not to require him to serve, was not "on the ground that he is an alien." It was on a ground applicable to all registrants, citizens and aliens alike, a ground not selected or selectable by the registrant, but one created by the government because it does not want the service of those whom it finds to be physically unfit according to a standard that it defines and applies. Surely, if Lapenieks had never been classified IV-C but had been classified IV-F throughout, he would be eligible for citizenship. It may be easier for judges who have firm convictions about the duty to serve to accept the idea of granting citizenship to an alien who actually serves after the government terminates his exemption than to accept the idea of granting it to Lapenieks, who did not serve because he turned out to be physically unfit.[2] But his relief from service on the ground that he was an alien was just as completely terminated when he was reclassified 1-A as

[2]This, I think, is the explanation for the dictum in *Hoellger*, 273 F.2d 762, n. 2. I note that a portion of that dictum, referring to an alien who voluntarily subjects himself to service after having been classified IV-C, was not followed in *Cannon*.

was the relief granted to Lacher, Rego, Cannon and Hoellger "on such ground" when each of them was thus reclassified. The relief later granted to, or thrust upon, Lapenieks as IV-F was not "on the ground that he [was] an alien."

My view is strengthened by the statement by this court in *Mangaoang v. Boyd,* 1953, 205 F.2d 553, 556, *cert. denied,* 346 U.S. 876, that a rule of strict construction should be applied to such statutes as the one before us. That rule was applied to this statute in *Rego.*

I would reverse.